UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SR INTERNATIONAL BUSINESS INSURANCE CO. LTD.,
Plaintiff-Counterclaim Defendant,

-v.-

WORLD TRADE CENTER PROPERTIES LLC, et al.
Defendants-Counterclaimants.

----------X 01 Civ. 9291 (JSM)

ORDER

WORLD TRADE CENTER PROPERTIES LLC, et al.,
Counterclaimants,

-v.-

ALLIANZ INSURANCE COMPANY, et al.

Additional Counterclaim Defendants.

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JOHN S. MARTIN, Jr., District Judge:

The Silverstein Parties have moved to compel production of a document titled "World Trade Center Loss – 11 September 2001 - Account Review", dated September 17, 2001, which was prepared by Swiss Re employees, Marcel Lemble and Peter Bernet. Swiss Re has resisted production of this document on the basis that it constitutes attorney work product prepared in anticipation of

litigation.[1] In support of this contention, Swiss Re has submitted the Affidavit of William Fawcett, an attorney employed in the Legal Claim and Tax Division of its Financial Services Business Group. In his affidavit, Mr. Fawcett states that on September 11, 2001, he was asked by Swiss Re management to provide legal advice concerning Swiss Re's potential exposure as a result of the attack on the World Trade Center, and that he "immediately anticipated that the property coverage we provided for the World Trade Center would become the subject of litigation." (Fawcett Aff. ¶ 4.) Mr. Fawcett goes on to state that as he "quickly concluded that litigation was almost a certainty . . .[he] began [his] investigation and analysis of the Swiss Re coverage and sought to retain outside litigation counsel, Simpson Thacher & Bartlett, on or about September 12." (Id., ¶ 6.) He states that

> The steps we took in anticipation of litigation concerning the World Trade Center coverage were certainly not typical of the type of investigation and analysis that Swiss Re conducts in the ordinary course of Swiss Re's business following a loss. . . . Among the atypical steps we took to protect Swiss Re's interests in potential future litigation were: (1) As noted above, I, as counsel and Head of Claims, got directly involved in gathering information and providing legal advice to Swiss Re management in anticipation of litigation, whereas in the ordinary course a claims manager would have been assigned to and handled the

[1]Actually, the document was inadvertently produced, and Swiss Re now seeks its return.

> claim through the adjustment process and (2) we immediately retained the litigation firm of Simpson Thacher & Bartlett, which we would never do in the ordinary course to adjust an ordinary claim.

(Id., ¶ 7.)

In the course of that investigation, Mr. Fawcett asked that an account review be prepared for the World Trade Center coverage "as part of my efforts to gather the information necessary to provide legal advice to my client in anticipation of litigation." (Id., ¶ 9.)

A party that seeks to withhold a document on the basis of the work product privilege must show that the document was not created in the ordinary course of business, but rather that it was created "because of" the anticipation of litigation, and would not have been created in essentially similar form but for the prospect of the litigation. United States v. Adlman, 134 F.3d 1194, 1195, 1202 (2d Cir. 1998). The Silverstein Parties argue here that the Account Review *was* prepared in the ordinary course of business. In support of this argument they cite testimony that this sort of review of the underwriting process was, at times, undertaken in an ordinary claim situation. (Daniel Bollier Dep. at 362.) In addition, they point to evidence that Swiss Re used the document for the ordinary business purpose of setting its reserves. Mr. Fawcett acknowledged this fact when he stated that:

> The Account Review provided me with

> information about the placement that I requested in order to analyze Swiss Re's exposure in potential litigation and advise management about that exposure. *My understanding is that it also served the dual purpose of informing the Product Management Department about the facts underlying the Silverstein placement and compliance of the underwriting process with internal guidelines.* I used the Account Review, among other sources of information that I gathered in the days following the September 11 attack, to provide legal advice to management.

(Fawcett Aff. ¶ 9)(emphasis added).

As the courts have recognized, it is particularly difficult to draw the distinction between documents prepared in the ordinary course of business and those created in anticipation of litigation in insurance cases because it is the ordinary business of insurers to investigate and adjust claims. See Am. Nat'l Fire Ins. Co. v. Mirasco, Inc., No. 99 Civ. 12405, 2001 WL 876816, at *2 (S.D.N.Y. Aug. 2, 2001); Mount Vernon Fire Ins. Co. v. Platt, No. 98 Civ. 8074, 1999 WL 892825, at *2 (S.D.N.Y. Oct. 19, 1999).

Based upon the Affidavit of William Fawcett and the other documents and testimony submitted in connection with this motion, the Court finds that the Account Review at issue here is entitled to work product protection pursuant to Rule 26(b)(3). The document was prepared by the employee of a party, at the request of counsel for that party, in anticipation of litigation, and counsel provided legal advice to the party on the basis of the document. While Swiss Re employees may at times have engaged in

similar investigations and prepared similar account reviews in the ordinary course of the business of investigating and adjusting claims in the absence of a threat of litigation and without involvement of counsel, Mr. Fawcett has stated that the investigation undertaken in this situation was, in fact, at his direction, of a different character, and not in the ordinary course of business or pursuant to ordinary procedures. Furthermore, Mr. Fawcett's statement that he immediately anticipated litigation in this far-from-ordinary case is far from implausible.[2] It is highly significant in this regard that he retained Simpson Thacher as litigation counsel on September 12. See Am. Nat'l Fire Ins. Co., 2001 WL 876816, at *2 ("An insurer's referral of a claim to its attorney is a significant factor in determining when the insurer anticipated litigation." (citing Mount Vernon Fire Ins. Co. v. Try 3 Building Serv., Inc., No. 96

[2]The Silverstein Parties argue that pursuant to N.Y. Insurance Law § 2601(a)(4), Swiss Re was required to devote some period of time, prior to entering a litigation mode, to attempting, in good faith, to promptly settle their claim. This argument is not persuasive, however, as the statute cited merely prohibits insurance companies from questioning the legitimacy of a loss or disclaiming coverage prior to any investigation of the underlying facts. See Mold Maint. Serv. v. Gen. Accident Fire and Life Assurance Corp., Ltd., 56 A.D.2d 134, 392 N.Y.S.2d 104, 106 (4th Dep't 1977). In this case, Swiss Re has never questioned the legitimacy of the loss, nor has it attempted to disclaim coverage. Moreover, the statute defines such actions as "unfair claim settlement practices" when they are "committed without just cause and performed with such frequency as to indicate a general business practice." There being no such allegations in this case, the statute is not implicated.

Civ. 5590, 1998 WL 729735 (S.D.N.Y. Oct. 16, 1998)). That such an expectation was reasonable is further supported by the Silverstein Parties' own decision to retain Wachtell, Lipton, Rosen & Katz, a firm well known for its litigation skills, on the evening of September 11.

The fact that the Account Review may also have been used in making business decisions does not negate its status as protected work product. United States v. Adlman, 134 F.3d at 1202; ECDC Envtl., L.C. v. New York Marine and Gen. Ins. Co., No. 96 Civ. 6033, 1998 WL 614478, at *12 (S.D.N.Y. June 4, 1998).

The work product privilege does not protect underlying facts from discovery merely because they have been incorporated into a privileged document. Upjohn Co. v. United States, 449 U.S. 383, 389, 396, 101 S. Ct. 677, 682, 686 (1981); United States v. Davis, 131 F.R.D. 391, 401 (S.D.N.Y. 1990). Thus, the Silverstein Parties may discover such facts from the Swiss Re employees who were involved in underwriting the insurance on the World Trade Center, as well as any outside individuals who were involved in that underwriting, unless, of course, their testimony is otherwise protected from disclosure. In addition, the pre-existing documents that are responsive to the Silverstein Parties' requests for production, which were gathered pursuant to counsel's direction that Swiss Re conduct an "organization-wide sweep for documents and information about the placement of the

Swiss Re coverage that was implicated by the September 11 attack," (Fawcett Aff., ¶ 7), and/or were used in preparing the Account Review, and have not previously been produced, are subject to disclosure in spite of their having been collected in the course of counsel's investigation. See Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 93 Civ. 6876, 1995 U.S. Dist. Lexis 14808, at *28 (S.D.N.Y. Oct. 10, 1995); United States v. Davis, 131 F.R.D. at 401.[3]

[3]The work product privilege is a qualified privilege, and may be overcome by a showing of substantial need. Fed. R. Civ. P. Rule 26(b)(3). The showing need only be minimal as to documents such as the Account Review which contains only factual work product, United States v. Weissman, No. S1 94 Cr. 760, 1995 WL 244522, *4 (S.D.N.Y. April 26, 1995). However, the Silverstein Parties have not made a sufficient showing in their papers of necessity and undue hardship with respect to the Account Review.

Conclusion

For the foregoing reasons, the Court finds that the document titled "World Trade Center Loss - 11 September 2001 - Account Review" is entitled to minimal, qualified protection from production pursuant to the attorney work product privilege. Therefore, the Silverstein Parties' motion to compel its production is denied, subject to further review in the event that they demonstrate to the Court that they have substantial need of the document in the preparation of their case and are unable to obtain its substantial equivalent by other means.

SO ORDERED.

Dated: New York, New York
August , 2002

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JOHN S. MARTIN, JR.
U. S. D. J.

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